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NO. 58433-2

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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MASTER BUILDERS ASSOCIATION OF KING AND SNOHOMISH  
COUNTIES; BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,

Petitioners/Appellant,

v.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS  
BOARD, an agency of the State of Washington; WASHINGTON STATE  
DEPARTMENT OF ECOLOGY, an agency of the State of Washington;  
WASHINGTON STATE DEPARTMENT OF COMMUNITY TRADE AND  
ECONOMIC DEVELOPMENT, an agency of the State of Washington;  
LIVABLE COMMUNITIES COALITION; WASHINGTON ASSOCIATION  
OF REALTORS; and CITIZENS' ALLIANCE FOR PROPERTY RIGHTS,

Defendants/Respondents.

CITY OF KENT,

Petitioner,

v.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS  
BOARD, an agency of the State of Washington; WASHINGTON STATE  
DEPARTMENT OF ECOLOGY, an agency of the State of Washington;  
WASHINGTON STATE DEPARTMENT OF COMMUNITY TRADE AND  
ECONOMIC DEVELOPMENT, an agency of the State of Washington;  
LIVABLE COMMUNITIES COALITION; WASHINGTON ASSOCIATION  
OF REALTORS; and CITIZENS' ALLIANCE FOR PROPERTY RIGHTS,

Respondents.

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**STATE AGENCIES' ANSWER TO PETITIONERS' MOTION FOR  
DISCRETIONARY REVIEW BY THE COURT OF APPEALS**

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ROB MCKENNA  
Attorney General

THOMAS J. YOUNG, WSBA # 17366  
Assistant Attorney General  
PO Box 40117  
Olympia, WA 98504  
(360) 586-6770

ROB MCKENNA  
Attorney General

ALAN D. COPSEY, WSBA # 23305  
Assistant Attorney General  
PO Box 40109  
Olympia, WA 98504  
(360) 664-4967

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## **I. IDENTITY OF RESPONDENTS**

Respondents Washington State Department of Ecology and Washington State Department of Community, Trade and Economic Development ("State Agencies") submit this Answer to the Motion for Discretionary Review filed by the Petitioners City of Kent, Master Builders Association, and Building Industry Association of Washington (collectively "Petitioners").

## **II. SUMMARY OF ANSWER**

The State Agencies do not object to direct review by this court. However, the State Agencies respectfully contend the statement of issues for review included by Petitioners in their motion do not accurately reflect the issues and arguments below and the subsequent Growth Management Hearings Board's decision. The State Agencies also contend the Petitioners' statement of the reasons for direct review and some of the factual assertions made by Petitioners are premised on a misreading of the Board's decision and are not supported by the record below.

The State Agencies recognize the Petitioners' right to frame issues for review in a manner favorable to their positions on those issues, but the State Agencies respectfully submit that this court's consideration of Petitioner's motion should be informed by an alternative statement of the factual and procedural history and the issues raised and argued below.

The State Agencies are prepared to provide a counter statement of issues in their response brief, as contemplated in RAP 10.3(b).

### III. FACTUAL AND PROCEDURAL BACKGROUND

In April 2005, the City of Kent adopted a new critical areas ordinance as required by the GMA. RCW 36.70A.130. The State Agencies appealed the ordinance to the Central Puget Sound Growth Management Hearings Board (“Board”) raising three primary sets of arguments.

First, the State Agencies argued the GMA required that the City include the best available science when adopting or updating development regulations to protect the functions and values of wetlands. Relying on reported appellate decisions interpreting the best available science requirement,<sup>1</sup> the State Agencies argued the Legislature required the inclusion of best available science because there is no other way to (1) determine accurately which functions and values exist in a given wetland, (2) determine what regulatory approaches effectively and meaningfully protect the functions and values of wetlands, and (3) assess whether the regulations are working to protect wetland functions and values.

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<sup>1</sup> In addressing the GMA’s critical areas and best available science requirements, the State Agencies relied most heavily upon three reported appellate decisions: *Ferry Cy. v. Concerned Friends of Ferry Cy.*, 155 Wn.2d 824, 123 P.3d 102 (2005); *Whidbey Envtl. Action Network (WEAN) v. Island Cy.*, 122 Wn. App. 156, 93 P.3d 885 (2004); *Honesty in Envtl. Analysis & Legis. (HEAL) v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 96 Wn. App. 522, 979 P.2d 864 (1999).

Second, the State Agencies argued that the protection given wetlands under the challenged ordinance was outside the range of the best available science in the record, and that it relied on wetlands classification parameters developed more than 20 years earlier. The State Agencies demonstrated that use of those parameters does not ensure wetlands protection because they are not related to, or predictive of, wetlands functions. The State Agencies showed how some high quality wetlands were given insufficient protection under the City's ordinance. *See Board Decision*, pp. 28-40.

Third, the State Agencies argued the City's asserted justifications for departing from the best available science in the record were not supported by the record. Still relying on reported appellate decisions, the State Agencies acknowledged that the Board must defer to policy choices made by the City in implementing the GMA, but explained (1) that local deference is constrained by the GMA's explicit requirements (requirements to protect critical area functions and values and to include the best available science in determining how to provide protection), (2) that the Board owes no deference to policy choices that are in conflict with the GMA's requirements, (3) that if the City departs from the best available science, it is still statutorily bound by the requirement to protect wetlands functions and values, and (4) that it is not impermissible burden-

shifting for the Board to conclude that the City's findings purporting to justify departure from the best available science were not supported by evidence in the record. *See* Board Decision, pp. 40-55.

The State Agencies also challenged the ordinance's definition of "wetland" or "wetlands" as impermissibly in conflict with the GMA, resulting in a failure to protect wetlands. *See* Board Decision, pp. 23-28.

The Board was persuaded by the State Agencies' arguments on all issues. Notably, the analysis and conclusions in the Board's final decision and order rested primarily on published appellate decisions, rather than on prior Board decisions. *See* Board Decision, pp. 1-3, 9-17. Relying primarily on *Whidbey Envtl. Action Network (WEAN) v. Island Cy.*, 122 Wn. App. 156, 93 P.3d 885 (2004), the Board concluded the City's reliance on superseded science, rather than the science in the record, did not comply with the GMA's mandate to protect wetlands functions and values. To determine whether the City complied with the GMA's requirement to include the best available science, the Board applied the criteria set forth in *Ferry Cy. v. Concerned Friends of Ferry Cy.*, 155 Wn.2d 824, 123 P.3d 102 (2005), and concluded the City's wetlands ordinance departed from the best available science in the record. Relying on *WEAN*, the Board concluded the City's departure was not supported by evidence in the record. Relying on *King Cy. v. Cent. Puget Sound Growth*

*Mgmt. Hrgs. Bd.*, 142 Wn.2d 543, 14 P.3d 133 (2000), and *Quadrant Corp. v. Growth Mgmt. Hrgs. Bd.*, 154 Wn.2d 224, 110 P.3d 1132 (2005), the Board concluded the City could not assert the need to balance the GMA's goals as justification for its noncompliance with a specific requirement of the GMA.

The Board remanded the ordinance to the City to bring it into compliance, but it did not invalidate the ordinance. The ordinance thus remains in effect during the period of remand pursuant to RCW 36.70A.300(4). At Petitioners' request, the Board issued a certificate of appealability pursuant to RCW 34.05.518(3).<sup>2</sup>

#### **IV. ALTERNATIVE GROUNDS FOR DIRECT REVIEW**

The State Agencies agree that direct review by this court is appropriate in this case. However, the State Agencies disagree with the Petitioners' reasons for direct review. Contrary to Petitioners' representations, there should be no uncertainty in Kent, or elsewhere, regarding the validity of Kent's critical areas ordinance. The ordinance was presumed valid and effective when adopted. RCW 36.70A.320(1). An order finding noncompliance does not render an ordinance invalid unless the Board makes specific findings and conclusions to that effect.

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<sup>2</sup> Petitioners have not mentioned the Board's Certificate of Appealability in their motion, nor did they provide a copy to this court. The State Agencies are submitting a copy of the Board's Certificate of Appealability as an attachment to this Answer.

RCW 36.70A.300(4); 36.70A.302(1). Because the Board did not invalidate the ordinance, it remains in effect during remand. RCW 36.70A.300(4).

The reasons direct review is appropriate here were stated by the Board in its Certificate of Appealability. The Board concluded that delay would be detrimental to the public interest because (1) the continued application of the noncompliant critical areas ordinance in Kent could lead to the degradation of wetlands in Kent, and (2) the Petitioners in this appeal challenge the Board's application of Washington Supreme Court and Court of Appeals precedent, thus creating uncertainty regarding the law that applies to critical areas ordinances. Certificate of Appealability, pp. 4-5. In addition, the Board concluded that the case presents fundamental issues of regional importance. *Id.*, pp. 6-7.

The State Agencies concur with the Board in this regard. The Petitioners essentially contend that local jurisdictions such as Kent can avoid their obligation to protect critical areas by reciting or alleging a need to meet other GMA goals, without producing any evidence to support that claim. If that is the law, then many local jurisdictions likely will opt not to protect critical areas. The resulting loss or degradation of critical areas would be contrary to the plain language of the GMA's goals and requirements and to the public interest in protecting the functions of

wetlands, including functions related to water storage, flood prevention, water filtration and purification, and wildlife. A speedy resolution of this issue is thus appropriate.

In their motion, Petitioners make a variety of factual assertions that are unsupported by the evidence in the record.<sup>3</sup> In general, Petitioners attempt to portray the Board and the State Agencies as forcing Kent to adopt a “one size fits all” set of critical areas regulations. This portrayal is inaccurate. The record reveals that the State Agencies gave Kent a variety of options by which it could meet its obligation under the GMA to protect critical areas. Board Decision, p. 34, n. 29. The record also reveals that the City’s own consultants and staff agreed with the State Agencies that the ordinance Kent adopted did not protect wetlands and did not comply with the GMA. *Id.*, pp. 37-38. They, too, offered the City various options to achieve compliance. *See, e.g.*, Ex. 186 (options offered by City staff).

The State Agencies also disagree with Petitioners’ contention that the Board “significantly and dramatically changed” the law regarding compliance with the GMA. Petitioners’ Motion, p. 21. To the contrary, as noted above, the Board took pains to follow Court of Appeals and

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<sup>3</sup> For example, Petitioners assert at p. 17 of their Motion that there has been a “rush” on the Kent Planning Department to vest projects in anticipation of stricter land use regulations. Petitioners, however, do not cite any evidence in support of this statement.



Washington Supreme Court precedents in reaching its decision, rather than its own decisions. *See, e.g.*, Board Decision, p. 2.

Nor did the Board shift any burden of proof to the City, as Petitioners allege. The Board properly stated the rule that the ordinance is presumed valid and the burden is on the State Agencies to prove that the ordinance is clearly erroneous. Board Decision, p. 5. The Board found this standard was met because the State Agencies had demonstrated that the City Council had not included the best available science in the ordinance it adopted so that its ordinance did not adequately protect wetlands, not because it shifted any burden of proof to the City. The Board found the City Council's findings and justifications for its wetlands ordinance were not supported by the best available science in the record. In rejecting the City's claim regarding its alleged need to meet other GMA goals, the Board did cite to the lack of any evidence in the record to support that claim, but in doing so it did not shift any burden of proof to the City. Instead, the Board followed the rule that local ordinances must be based on evidence in the record, not speculation, and it closely followed this court's decision in *WEAN. Id.*, pp. 16-17, 45.

The State Agencies agree with the Petitioners that this case is likely to have significant precedential value. None of the prior appellate cases interpreting the GMA deal specifically with wetlands and wetlands


protections. A ruling by this court, in this case, likely would provide significant guidance to other jurisdictions that must update their critical areas ordinances in the future.

## V. CONCLUSION

For the reasons stated above, the State Agencies agree with the Petitioners that direct review by this court is appropriate in this case, but for different reasons and with respect to different issues.

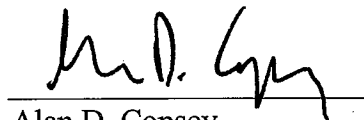
RESPECTFULLY SUBMITTED this 24 day of July, 2006.

ROB MCKENNA  
Attorney General



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Thomas J. Young  
Assistant Attorney General  
WSBA No. 17366



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Alan D. Copsey  
Assistant Attorney General  
WSBA No. 23305